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GONSALVES & SANTUCCI, INC.

8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA

11 ELMER N. RODRIGUEZ, an individual and on
12 behalf of all others similarly situated,

13 Plaintiffs,

14 v.

15 GONSALVES & SANTUCCI, INC., a California
corporation; and DOES 1 through 100, inclusive,

16 Defendants.
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Case No. 3:21-cv-07874-LB

NOTICE OF MOTION & MOTION TO
DISMISS PLAINTIFF'S FIRST AMENDED
COMPLAINT PURSUANT TO FED. R.
CIV. P. 12(b)(6); MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT

Hearing Date: March 31, 2022
Time: 9:30 a.m.
Judge: Hon. Laurel Beeler
Location: Via Zoom
Webinar ID: 161 469 8626
Password: 546984

NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 31, 2022 at 9:30 AM, or as soon thereafter as the matter can be heard, in Courtroom B – 15th Floor, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Gonsalves & Santucci, Inc. (“Defendant”) will and hereby does move the Court for an order dismissing Plaintiff’s First Amended Complaint (“FAC”) with prejudice under Federal Rule of Civil Procedure 12(b)(6). Defendant brings the present Motion on the ground that Plaintiff’s claims are preempted by the Labor Management Relations Act, 28 U.S.C. § 185, *et seq.* (“LMRA”) and thus Plaintiff’s FAC fails to state a claim upon which relief can be granted as a matter of law, and the FAC must be dismissed in its entirety with prejudice.

This Motion is based on this Notice, the following Memorandum of Points and Authorities, and all accompanying exhibits, and all the pleadings, papers, and records on file herein, as well as any other argument or evidence presented at or before the time of the hearing on this Motion.

Dated: February 22, 2022

LITTLER MENDELSON P.C.

s/ William J. Kim

Gregory G. Iskander
William J. Kim

Attorneys for Defendant
GONSALVES & SANTUCCI, INC.

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I. INTRODUCTION

Plaintiff's First Amended Complaint ("FAC") is an inadequate and frivolous attempt to avoid the Court's order dismissing this case on grounds of preemption. The FAC duplicates Plaintiff's original complaint and asserts nearly identical factual allegations, with superfluous amendments that change nothing about the nature of the original claims. Each of Plaintiff's causes of action alleged in the FAC continues to involve a right conferred solely by the collective bargaining agreement ("CBA") or substantially depends on analysis and interpretation of the CBA. Thus, as the Court has already held, Plaintiff's claims are preempted by Section 301 of the Labor Management Relations Act ("LMRA"). (ECF No. 31.) In addition, the derivative claims cannot proceed without resolving the previously dismissed wage and hour claims, and without Plaintiff's compliance and completion of the CBA's grievance arbitration process. Until these substantive wage and hour claims are resolved in the appropriate forum before the Board of Adjustment, Plaintiff cannot circumvent the Court's ruling by asserting derivative claims in court. Because the Court has already held that Plaintiff failed to adhere to the grievance procedure as expressed in the CBA, and his FAC continues to omit *any* facts alleging exhaustion, the FAC must be dismissed with prejudice and without leave to amend because there is no conceivable amendment which cures this glaring deficiency.

II. STATEMENT OF ISSUE TO BE DECIDED

The issue raised by this motion is whether the Court should dismiss the First Amended Complaint in its entirety with prejudice because Section 301 of the LMRA preempts Plaintiff's claims and Plaintiff fails to submit any factual or legal amendments which avoid Plaintiff's obligation to submit his claims to a grievance arbitration.

III. STATEMENT OF FACTS

A. Plaintiff's Amendments After Dismissal of His Original Complaint

Rodriguez filed his first Complaint on August 24, 2021 (ECF # 2-1) which alleges he was employed by Defendant as a non-exempt employee who was assigned duties to assist on construction projects in California from February 2020 through December of 2020. (*See* ECF # 2-1, ¶ 2). The Complaint, asserted as a class action, included nine causes of action asserting a variety of wage and hour violations under California law (*See* ECF #2-1, ¶¶ 30-92.)

On October 7, 2021, G&S removed the action from Contra Costa Superior Court on the basis of federal subject matter jurisdiction. (ECF # 1.) Because all of Plaintiff's claims were preempted by Section 301 of the Labor Management relations Act, G&S then proceeded to move for dismissal of the original Complaint. (ECF #13.) On January 18, 2022, the Court granted Defendant's motion and dismissed Plaintiff's claims, but Plaintiff was granted leave to amend his complaint by February 8, 2022. (ECF #31.)¹

On February 8, 2022, Plaintiff filed his First Amended Complaint which re-alleged the following four causes of action: (1) failure to pay minimum wages as required by Labor Code §§ 1197, 1199 and IWC Wage Orders; (2) failure to provide accurate wage statements as required by Labor Code § 226; (3) failure to pay all wages due at termination as required by Labor Code §§ 201-203 and IWC Wage Orders; and (4) violation of Business & Professions Code § 17200. (*See* ECF #32, ¶¶ 26-52.) The only discernible factual amendments are as follows:

Minimum Wages Claim (ECF #32 at ¶ 10) adds other type of compensable activities which Plaintiff alleges were not paid minimum wages for such as: "to come early to work and leave late work without being able to clock in for all that time, to complete pre-shift tasks before clocking in and post-shift tasks after clocking out, to don and doff uniforms and safety equipment off the clock, and/or go through temperature checks off the clock."

Inaccurate Wage Statements Claim (ECF #32 at ¶11) expands upon the requirements of an accurate wage statement such as the name and address of the legal entity.

Failure to Pay Timely Wages Claim (ECF #32, ¶ 12) removes references to a failure to pay of overtime and premium wages and adds the allegation that the final paycheck was issued approximately 7 to 8 days after Plaintiff's last day of work.

All other factual allegations in the FAC are essentially identical. (Compare ECF #32, ¶¶11-14 with ECF # 2-1, ¶¶ 14, 15, 18 and 19.)

¹ Notably, in an additional effort to avoid the prior motion and Order, Plaintiff filed a separate action in Contra Costa Superior Court (*Rodriguez v. Gonsalves & Santucci*, Case No. C21-02242) asserting the same exact underlying claims against Defendant, however as a PAGA only action in order to avoid federal court jurisdiction.

B. The Collective Bargaining Agreement Applies to Plaintiff's Employment

The Court took judicial notice of the applicable CBAs and found that Rodriguez was a member of a CBA governing ironworkers' employment. (ECF #31, at p. 2.) The CBA provides that the union is the employees' exclusive bargaining representative and sets forth worked covered. (*Id.*; *see also* ECF #3-2 at pp. 5-9, 12.) The covered work includes the minimum hourly and overtime compensation for the plaintiff and putative class (ECF #3-2, 2020 CBA, "Schedule Apprentices Hourly Wage Rates and Journeyman Iron Workers Total Hourly Wage & Fringe Benefit Package," pp. 73-80), how pay is distributed and the content of the pay statements (ECF #3-2, 2020 CBA Sec. 8. Pay Day, pp. 31-32), and provides that payday is once a week on a day agreed to by the union and the employer. (*Id.*). In addition, the CBA provides a grievance procedure for the settlement of disputes which includes a Board of Adjustment comprised of two union representatives and two employer representatives, and further provides for resolving disputes arising out of the meaning and enforcement of the CBA. (ECF # 3-2, 2020 CBA, Sec. 28., Grievance Procedure, p. 65.)

IV. LEGAL ARGUMENT

A. This Court Should Dismiss Plaintiff's FAC Pursuant to Federal Rule of Civil Procedure 12(b)(6)

After Plaintiff was provided another opportunity to amend his Complaint, his additional allegations in the FAC fail to cure the fatal deficiencies in his original Complaint, and accordingly fail to establish entitlement to relief under Fed. R. Civ. P. 12(b)(6). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). "The court must dismiss a complaint that does not assert, or fails to plead sufficient facts to support, a cognizable legal theory. *Marquez v. Toll Glob. Forwarding (USA) Inc.*, 2018 WL 3218102, at *3-4 (C.D. Cal. June 28, 2018) (citing Fed. R. Civ. P. 12(b)(6) and *Balisteri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). This Court has already held that the "unpaid wages claim turns on the analysis of the CBA and interpretation of its terms." (ECF #31 at p. 9.) And this Court also held that Plaintiff's derivative claims for "waiting time penalties, failure to pay final wages in violation of Cal. Labor Code § 203, failure to provide accurate statements, and the UCL claim ...require analysis and interpretation of the CBA." (ECF #31 at p. 10.) Applying the same standards in reviewing Plaintiff's

original Complaint, the Court must yet again, dismiss Plaintiff's FAC as Plaintiff's meaningless factual amendments do nothing to avoid the final outcome: Plaintiff's claims are preempted by Section 301 of the LMRA, and all his claims must be submitted to binding grievance arbitration. Because it is inconceivable to allege any facts or legal bases for his claims to proceed in this Court, any further attempt to seek leave by Rodriguez should be denied as amendment would be clearly futile.

B. Section 301 of the LMRA Preempts All of Plaintiff's Claims

This Court aptly summarized binding and unequivocal precedent by the United State Supreme Court: Section 301 of the LMRA "completely preempts any state claims based on alleged violations of collective-bargaining agreements between employers and labor organizations." (ECF #31 at p. 5) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 23 (1983)) "If a claim is 'founded directly on rights created by collective-bargaining agreements' or is 'substantially dependent on analysis of a collective-bargaining agreement,' then § 301 preempts it." *Id.* (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987)).

Adhering to Ninth Circuit precedent, the Court then proceeded to explain the two parts of the preemption inquiry. First, a court must determine "whether the asserted cause of action involves a right conferred upon an employee by virtue of state law, not by a CBA. If the right exists solely as a result of the CBA, then the claim is preempted." (ECF # 31, p. 5) (citing *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059–60 (9th Cir. 2007)). Second, if the right underlying the state claim exists independently of the CBA, then the court considers whether the right is "substantially dependent on analysis of a collective bargaining agreement." *Id.*

1. Plaintiff's Claim for Minimum Wages (First Cause of Action) Substantially Depend on Interpretation and Analysis of the CBA

Plaintiff's factual amendments to his minimum wage claim do nothing to change the outcome of the Court's conclusive ruling that Plaintiff's minimum wages claim require substantial interpretation and analysis of the CBA. (ECF #31, p. 9); *see also Kroeger v. Vertex Aerospace LLC*, 2020 WL 3546086, at *7 (C.D. Cal June 30, 2020) (finding that because the FAC largely repleads the same core factual allegations with omitted references to the CBA, union rules, grievances and the NLRA, it did not save Plaintiff's claims from preemption under the LMRA); *Yellowcake, Inc. v.*

1 *Morena Music, Inc.* 522 F.Supp.3d 747, 776 (E.D. Cal. 2021) (finding factual allegations did not
 2 sufficiently remove conversion claim from preemption and thus dismissing claim). Plaintiff's FAC
 3 only adds other type of compensable activities for which Plaintiff alleges he was not paid minimum
 4 wages: "to come early to work and leave late work without being able to clock in for all that time, to
 5 complete pre-shift tasks before clocking in and post-shift tasks after clocking out, to don and doff
 6 uniforms and safety equipment off the clock, and/or go through temperature checks off the clock."
 7 (ECF #32 at ¶ 10.) These additional amendments do not provide a means of escape from the Court's
 8 ruling because they would *still* require substantial interpretation and analysis of the CBA. As the Court
 9 held, "[a]t minimum, resolution of the claims requires interpretation of CBA terms such as 'actual
 10 hours worked' and 'show up expenses. Thus, the unpaid wages claim turns on the analysis of the CBA
 11 and interpretation of its terms.'" (ECF #31, p. 9.) And "[d]etermining the meaning of industry terms is
 12 a form of interpretation." *Id.* (citing *Marquez v. Toll Global Forwarding*, 804 Fed.Appx. 679, 681 (9th
 13 Cir. 2020)). The Court should dismiss this claim consistent with its Order.

14 **2. Plaintiff's Failure to Pay Timely Final Wages Claim (Third Cause of**
 15 **Action) is Subject to Preemption as a Result of Alternative Pay**
 16 **Arrangements Provided by the CBA**

17 As the Court held, the LMRA preempts the claim for failure to timely pay final wages under
 18 Cal. Labor Code §§ 201 through 203 because the CBA has different pay arrangements. (ECF #31, p.
 19 8) (citing *Gillette v. Stater Bros. Mkts., Inc.*, No. 19-cv-1292-JVS, 2019 WL 8017735, at *6 (C.D. Cal.
 20 Sept. 23, 2019)). When a CBA has alternate pay arrangements to those in the Labor Code, wage
 21 payments arise under the CBA and not state law. *Id.*, (citing *Hall v. Live Nation Worldwide, Inc.*, 146
 22 F. Supp. 3d 1187, 1201–02 (C.D. Cal. 2015)). The Court found that the CBA provided that the regular
 23 payday was once a week "on the day agreed upon between" the employer and the union. And laid-off
 24 or terminated employees are to be paid in full immediately by check or other defined means, and if
 25 required to go elsewhere (such as the employer's office), they are to be paid for the time to get there.
 26 *Id.* (citing 2017 CBA (ECF # 3-1), at p. 44; 2020 CBA (ECF #3-2), at p. 44)). The CBA provides for
 27 penalties if workers are not paid during usual working hours, including overtime pay for extra time
 28 spent on the job site or for delay. *Id.* (citing 2020 CBA (ECF #3-2) at pp. 44-45). Accordingly, these

are alternate pay arrangements, and thus Plaintiff's wage payment rights arise under the CBA and not state law. *Id.* (citing *Gillette*, 2019 WL 8017735 at *6; *Hall*, 146 F. Supp. 3d at 1201-02). Plaintiff's apparent attempt to change the claim from a derivative claim to a direct claim does nothing to save the claim from preemption. Whether Plaintiff's final pay was late or not, is governed directly by the CBA and/or requires interpretation of the final pay provisions of the CBA.

3. Plaintiff's Waiting Time Penalties and Failure to Pay Final Wages (Third Cause of Action), Inaccurate Wage Statements (Second Cause of Action) and UCL (Fourth Cause of Action) Claims Depend Entirely on the Underlying Unpaid Wages Claims

Plaintiff's claim for waiting time penalties and failure to pay final wages,² and remaining claims for failure to provide accurate wage statements, and unlawful conduct in violation of Business and Professions Code §17200 *et seq.*, depend entirely on the outcome of the other causes of action brought forth by Plaintiff. (ECF #31, p. 10.) Thus, because the minimum wages claim will require analysis and interpretation of the CBA, this in turn will determine what wages Plaintiff is entitled to at the time of separation and the resulting accuracy of the wage statements. *Id.* (citing *Curtis v. Irwin Industries, Inc.*, 913 F.3d 1146, 1150 n. 3 (9th Cir. 2019) (finding inaccurate pay stub and final pay claims as derivative claims of minimum wage claims)). Therefore, resolution of these claims depends entirely upon the claims for the unpaid minimum wages claim.

"The UCL claim similarly stands or falls on the predicate claims." (ECF #31, p. 10) (citing *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544 (2007) ("[A] violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong.")). Thus, UCL claims under this prong "stand or fall depending on the fate of the antecedent substantive causes of action." *Krantz v. BT Visual Images, LLC*, 89 Cal. App. 4th 164, 178 (2001).

Accordingly, Section 301 of the LMRA preempts Plaintiff's derivative claims for waiting time penalties and a failure to pay final wages under Labor Code section 203, inaccurate wage statements, and unfair unlawful conduct under the UCL because liability stems from the same underlying issues. *See, e.g., Jimenez v. Young's Mkt. Co., LLC*, No. 21-cv-02410-EMC, 2021 WL 5999082, at *13 (N.D. Cal. Dec. 20, 2021) (claims that are derivative of claims that are preempted are themselves preempted).

² As indicated above, this claim is also preempted because this right arises under the CBA and not state law.

C. Plaintiff's First Amended Complaint Should Be Dismissed Without Leave to Amend Because Plaintiff Failed to Exhaust the CBA's Grievance Procedures

The CBA sets forth a detailed and comprehensive grievance procedure that parties must follow in the event of a dispute arising out of any member's employment with G&S. (ECF #3-2, 2020 CBA, Sec. 28 Grievance Procedure.) A failure to exhaust exclusive contractual remedies warrants dismissal of Plaintiff's claims. *See Soremekun v. Thrifty Payless, Inc.* 509 F.3d 978, 988-89 (9th Cir. 2007) (summarily dismissing Plaintiff's claims for failure to exhaust exclusive contractual remedies under the collective bargaining agreement). The Court found that Plaintiff pleaded no facts in his original complaint that he exhausted the CBA's grievance process. (ECF #31, p. 11.) Here, again Plaintiff's FAC notably omits any allegation³ he complied with this grievance procedure and submitted his claims to the Board of Adjustment. As a result, this Court should dismiss Rodriguez's FAC, requiring him to first⁴ pursue these claims under the CBA's grievance arbitration provisions.

D. The Court Should Dismiss Plaintiff's First Amended Complaint With Prejudice

To the extent Plaintiff seeks leave to amend the Complaint yet another time, the Court should decline. Although leave to amend should generally be granted liberally under Fed. R. Civ. P. 15, leave is not appropriate when one or more of the *Foman* factors is present: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party, and (5) futility of amendment. *Foman v. Davis*, 371 U.S. 178 (1962). Denial of leave to amend is particularly appropriate where the new claims are barred by a failure to exhaust administrative remedies. *See J.M. v. Los Angeles Unified School District*, 2019 WL 2871144 at *3 n. 7 (C.D. Cal. March 13, 2019) (finding futility when plaintiff failed to allege any new facts showing it would not be subject exhaustion requirement); *see also Paul G. v. Monterey Peninsula Unified School District*, 2018 WL 2763302 at *12 (N.D. Cal. Jun 8, 2018) (finding leave to amend not warranted when second amended complaint proffered no additional facts or legal bases that could remedy the deficiency regarding the administrative exhaustion requirement). Here, Plaintiff alleges no new facts

³ G&S continues to be unaware of any grievance or complaint submitted by Mr. Rodriguez.

⁴ Should the Court decline to dismiss Plaintiff's FAC in its entirety or permits Plaintiff to proceed with only some of his claims, G&S respectfully requests a stay of this matter pending resolution of the claims which Plaintiff must bring before the Board of Adjustment.

1 that change the ultimate outcome that his claims are preempted, and he must exhaust his remedies
2 through the grievance procedure.

3 **V. CONCLUSION**

4 All of Plaintiff's claims exist solely as a result of the CBA or are substantially dependent on
5 analysis of the applicable CBA between Defendant Gonsalves & Santucci, Inc. and the Union covering
6 Plaintiff's employment. As the Court has already held, these claims are completely preempted under
7 Section 301 of the Labor Management Relations Act. Defendant respectfully requests that the Court
8 dismiss the FAC in its entirety with prejudice and without leave to amend because amendment would
9 be futile.

10 Dated: February 22, 2022

LITTLER MENDELSON P.C.

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12
13 *s/ William J. Kim*

Gregory G. Iskander
William J. Kim

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15 Attorneys for Defendant
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